

TCEQ DOCKET NO. 2010-1326-PST-E
SOAH Docket No. 582-11-3204

IN THE MATTER OF
AN ENFORCEMENT ACTION
AGAINST ALI ZULFIQUAR D/B/A
MINI MART 102 AND ZQS
CORPORATION, INC, D/B/A
MINI MART 102;
RN 102714474

BEFORE THE TEXAS

COMMISSION ON

ENVIRONMENTAL QUALITY

CHIEF CLERKS OFFICE

2011 DEC -5 AM 9:13

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITYResponse to Proposal for Decision

Respondents Ali Zulfiqar d/b/a Mini Mart 102 and ZQS Corporation, Inc. d/b/a Min Mart 102 ("Respondents") hereby file this Response to the Proposal for Decision herein.

General

As will be noted more specifically below, the Proposal for Decision reflects the position of the TCEQ which, in turn, contains serious violations of the Due Process Provisions and Excessive Fines and Penalties Prohibitions of the Texas Constitution, Texas Constitution, Art. I, Sec. 19, and the Separation of Powers provisions of the Texas Constitution Art V, sec. 1. It should also be noted that the same aspects violate the Due Process Provision of the United States Constitution, Amend. XIV, and the Excessive Fines and Penalties provision of the U.S. Constitution, Amend. VIII. *United States v. Bajakajian*, 524 U.S. 321 (1998).

Responsibilities of Respondent As Facility Operator(Page 3, Para. B)

There is an obvious legal flaw in the opening assumption that Respondents are the "owners" of the affected facilities. The cited bill of sale for personal property did not and could not convey title to realty, in part because it lacked any legal description but primarily because the equipment in question was clearly

affixed to the realty itself. The document relied upon (Bill of Sale, ED-7) contains no property description and indeed contains no words of conveyance. Finally, the same document clearly indicates that the sell (Bin Trahn) was responsible for the pumps to be in working condition at the time of sale.

The Commission rule quoted at Page 4 ("Any person who holds legal possession or ownership of an interest in an underground storage tank") exceeds the Commission's legislative authority under Tex. Water Code Ann. Sec. 7.051.

B. Respondent's Responsibilities as Facility Operator

(Page 5)

The error here is in the final sentence: "...[L]ack of knowledge is not excused under TCEQ's *rules and practices*." (emphasis added).

TCEQ is not imbued with legislative power to decree the conditions under which personal liability may attach. That function is reserved to the Texas Legislature under this State's Constitution. Respondents assert that in order for liability to attach and to support the imposition of any fine or penalty, scienter must be demonstrated. TCEQ has failed to do so.

5. Insurance

(Page 7)

Although in other instances the Administrative Law Judge has accepted the testimony of TCEQ personnel as true, in the matter of insurance it rejects the uncontroverted testimony of Respondent that he did have insurance. The burden lies on TCEQ to prove that Respondent did not have insurance. The person cited as the insurer was equally accessible to both parties and in fact lived and had his offices in Austin, Travis County, Texas. TCEQ has failed in its burden and the proposed finding is contrary to the uncontradicted evidence of Respondent Zulfiqar.

6. Pressurized Leak Detection

(Page 8)

In connection with assessment of penalties, below, it should be noted that pressure tests were eventually performed and revealed that the facility was in satisfactory condition. There was, in short, no harmful or unauthorized release of hydrocarbons into the environment.

7. Sump Inspections

(Page 9)

Again, as above, the Proposed Findings seek to impose personal liability in the absence of scienter.

Furthermore, there was no evidence whatsoever that any water was ever admitted to the fuel tank.

Finally, the testimony of Ms. Merritt fell short of establishing that there ever was any reason to believe that water was or could have been in the tanks. The description and possibly photographs showed at most normal accumulations of water in an area *below* the inlet to the underground fuel tank.

C. Administrative Penalty

(Page 9)

The entire work product of Witness Porras is contaminated, as it were, by ED-22, the July 24, 2007 Memo of one Glenn Shankle. That memo is a classic instance of bureaucratic arrogance, seeking to arbitrarily modify statutes and rules to the benefit of the agency in question. The memo begins:

"In an effort to ensure that the calculation of administrative penalties is a transparent process, I'm directing you [to] revise the current penalty calculation worksheet such that the penalty first be calculated at the statutory maximum and then reduced and/or escalated based on culpability,

compliance history, good faith efforts to comply, economic benefit, and other factors as justice may require.”

The memo and the policy it implemented is all too “transparent”, and is arbitrarily and capriciously so. There appears to be no legislative presumption or authorization for beginning the calculations at the maximum and working down, as suggested. Furthermore, there appears to be no statutory authorization whatever for exceeding the maximum penalties.

The Memo, ED-22 (attached as “A” hereto for ready reference). is “transparently” an improper attempt by a state official to arrogate to himself or his agency the authority for amending the statute by internal fiat. Whatever else she may have done, Ms. Porras clearly used the directive in ED-22 as her binding guidance.

The motives of Executive Director Shankle are perhaps irrelevant, but it is worth noting that as of 2007, the State of Texas was just coming to grips with fiscal crises which resulted from executive and legislative decisions made in previous years. In context, ED-22 appears to have been nothing less than an arbitrary reach for revenue.

The supposedly “expert” testimony of Ms. Porras should not weigh in the balance because that witness was purporting to testify as to matters of law which are reserved to the factfinder, i.e., the Administrative Law Judge. Tex. R. Evid. 701-704 (Opinions as to Matters of Fact).

To the event Ms. Porras’ testimony is entitled to any standing at all, she clearly disobeyed ED-22 in failing to take into account the persons’ circumstances of the Respondent herein, e.g., dealing in an unfamiliar line of work, in a second language, and with equipment previously maintained by another.

It is further argued that the Agency and the Proposed Findings err in holding Respondents herein liable on the basis of violations committed by a predecessor in

title. This is not an *in rem* proceeding. Under no constitutional reading of any law can Mr. Zulfiqar be held liable for the transgressions of his predecessor, Mr. Trahn.

D. Respondent's Ability to Pay

(Page 13)

The 2007 directive, ED-22, urged that penalties be sufficient to deter compliance. It did not command, nor does it justify, that penalties be set to drive a person out of business because of administrative failing which never rose to the level of any actual harm to persons or the environment.

Yet this is exactly what the TCEQ and the Proposed findings would do.

Again, the testimony of Ms. Seidenberger and her pejorative suspicions about Mr. Zulfiqar's inventory levels should not be accorded any weight. TRE 701-704. Ms. Seidenberger is not a CPA and, as noted, had no knowledge of the workings of this or any other convenience store.

The proposed findings regarding the personal finances of Mr. Zulfiqar are, again, capricious and arbitrary. This man is not General Motors and cannot employ batteries of accountants and lawyers to document every last cent of expenditures. The fact finder apparently recognizes that his is a marginal business at best.

The arbitrary and capricious nature of the Proposed Findings is best illustrated by published poverty guidelines, attached as Exhibit "B" hereto, of which the hearing officer may and should take careful judicial notice.

Within the 48 contiguous states, the poverty level for a family of six (i.e., two parents and four children) is \$29,990. The proposed "fine" of \$552 per month would come to c. 6,622 per year. That amount, deducted from \$36,000 per year, leave \$29,378, somewhat below the poverty line.

There is nothing "odd" in the fact that the combined salaries of Mr. and Mrs. Zulfiquar should come to \$36,000, as reported. There is, however, something "odd" in the conclusions of Ms. Seidenberger, an unqualified "expert", to the effect that an appropriate penalty would drive respondents to and just below the poverty line. The ALJ herein should carefully consider whether the TCEQ has adopted a sub rosa "policy" of determining the amount necessary to bring accused violators to the poverty line and adjusting their arbitrary opinions to support that amount.

Conclusion

The proposed findings would adopt the arbitrary, capricious and constitutionally suspect position of the TCEQ, for the reasons above stated.

Respectfully submitted,



/s/ Mark W. Stevens

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Certificate of Service

This is to certify that a true and correct copy of the foregoing document has been forwarded to the following as indicated below on December 5, 2011.

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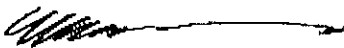
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/s/ Mark W. Stevens
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COUNTY OF TRAVIS

JUN 20 2011

I hereby certify this is a true and correct copy of a
Texas Commission on Environmental Quality (TCEQ)
document, which is filed in the Records of the Commission
Given under my hand and the seal of office.

B. Wilson
Billy R. Wilson, Custodian of Records
Texas Commission on Environmental Quality

Texas Commission on Environmental Quality

INTEROFFICE MEMORANDUM

To: John Sadlier, Deputy Director, OCE
Matthew R. Baker, P.E., Director, Enforcement
Division

Date: July 24, 2007

From: Glenn Shankle, Executive Director *GS*

Subject: Revisions to the Penalty Calculation Worksheets; Speciation of emission
events and recovery of avoided costs of compliance

In an effort to ensure that the calculation of administrative penalties is a transparent process, I'm directing that you revise the current penalty calculation worksheet such that the penalty first be calculated at the statutory maximum and then reduced and/or escalated based on culpability, compliance history, good faith efforts to comply, economic benefit, and other factors as justice may require. The duration of the penalty event will be calculated pursuant to the Commission's current penalty policy taking into account the nature and gravity of the alleged violation. All proposed penalties should be of an amount necessary to deter future noncompliance.

In order to ensure that proposed penalties are commensurate to the violations alleged, I am also asking that you institute the following as the situation warrants:

1. When calculating penalties for significant emission events that occur over a short duration, speculation of that event is an appropriate means to ensure that the calculated penalty is of an amount adequate to address the violation and provide an appropriate deterrent effect; and
2. In cases where a respondent has realized an economic benefit by avoiding the costs associated with compliance, it is appropriate to escalate the penalty through the use of "Other Factors as Justice May Require" in order to offset that benefit.

cc: Mark Vickery, Deputy Executive Director
Stephanie Bergeron Perdue, Deputy Director, OLS
Sonia Ralls, Executive Assistant to Executive Director
Keri Rowland, Special Counsel to Executive Director
Mary Risner, Director, Litigation Division

EXHIBIT

EX-22

"A"

2011 HHS Poverty Guidelines

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hhs.gov

U.S. Department of Health & Human Services

The 2011 HHS Poverty Guidelines

One Version of the [U.S.] Federal Poverty Measure

[[Federal Register Notice, January 20, 2011](#) — Full text][[Prior Poverty Guidelines and Federal Register References Since 1982](#)][[Frequently Asked Questions \(FAQs\)](#)][[Further Resources on Poverty Measurement, Poverty Lines, and Their History](#)][[Computations for the 2011 Poverty Guidelines](#)]

There are two slightly different versions of the federal poverty measure:

- The poverty thresholds, and
- The poverty guidelines.

The **poverty thresholds** are the original version of the federal poverty measure. They are updated each year by the **Census Bureau** (although they were originally developed by Mollie Orshansky of the Social Security Administration). The thresholds are used mainly for **statistical** purposes — for instance, preparing estimates of the number of Americans in poverty each year. (In other words, all official poverty population figures are calculated using the poverty thresholds, not the guidelines.) Poverty thresholds since 1973 (and for selected earlier years) and weighted average poverty thresholds since 1959 are available on the Census Bureau's Web site. For an example of how the Census Bureau applies the thresholds to a family's income to determine its poverty status, see "[How the Census Bureau Measures Poverty](#)" on the Census Bureau's web site.

The **poverty guidelines** are the other version of the federal poverty measure. They are issued each year in the *Federal Register* by the **Department of Health and Human Services (HHS)**. The guidelines are a simplification of the poverty thresholds for use for **administrative** purposes — for instance, determining financial eligibility for certain federal programs. The [Federal Register notice of the 2011 poverty guidelines](#) is available.

The poverty guidelines are sometimes loosely referred to as the "federal poverty level" (FPL), but that phrase is ambiguous and should be avoided, especially in situations (e.g., legislative or administrative) where precision is important.

Key differences between poverty thresholds and poverty guidelines are outlined in a table under [Frequently Asked Questions \(FAQs\)](#). See also the [discussion of this topic](#) on the Institute for Research on Poverty's web site.

NOTE: The poverty guideline figures below are NOT the figures the Census Bureau uses to calculate the number of poor persons.

The figures that the Census Bureau uses are the poverty thresholds.

2011 HHS Poverty Guidelines

Persons in Family	48 Contiguous States and D.C.	Alaska	Hawaii
1	\$10,890	\$13,600	\$12,540
2	14,710	18,380	16,930

"B"

2011 HHS Poverty Guidelines

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3	18,530	23,160	21,320
4	22,350	27,940	25,710
5	26,170	32,720	30,100
6	29,990	37,500	34,490
7	33,810	42,280	38,880
8	37,630	47,060	43,270
For each additional person, add	3,820	4,780	4,390

SOURCE: *Federal Register*, Vol. 76, No. 13, January 20, 2011, pp. 3637-3638

The separate poverty guidelines for Alaska and Hawaii reflect Office of Economic Opportunity administrative practice beginning in the 1966-1970 period. Note that the poverty thresholds — the original version of the poverty measure — have never had separate figures for Alaska and Hawaii. The poverty guidelines are not defined for Puerto Rico, the U.S. Virgin Islands, American Samoa, Guam, the Republic of the Marshall Islands, the Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, and Palau. In cases in which a Federal program using the poverty guidelines serves any of those jurisdictions, the Federal office which administers the program is responsible for deciding whether to use the contiguous-states-and-D.C. guidelines for those jurisdictions or to follow some other procedure.

The poverty guidelines apply to both aged and non-aged units. The guidelines have never had an aged/non-aged distinction; only the Census Bureau (statistical) poverty thresholds have separate figures for aged and non-aged one-person and two-person units.

Programs using the guidelines (or percentage multiples of the guidelines — for instance, 125 percent or 185 percent of the guidelines) in determining eligibility include Head Start, the Food Stamp Program, the National School Lunch Program, the Low-Income Home Energy Assistance Program, and the Children's Health Insurance Program. Note that in general, cash public assistance programs (Temporary Assistance for Needy Families and Supplemental Security Income) do NOT use the poverty guidelines in determining eligibility. The Earned Income Tax Credit program also does NOT use the poverty guidelines to determine eligibility. For a more detailed list of programs that do and don't use the guidelines, see the Frequently Asked Questions (FAQs).

The poverty guidelines (unlike the poverty thresholds) are designated by the year in which they are issued. For instance, the guidelines issued in January 2011 are designated the 2011 poverty guidelines. However, the 2011 HHS poverty guidelines only reflect price changes through calendar year 2010; accordingly, they are approximately equal to the Census Bureau poverty thresholds for calendar year 2010. (The 2010 thresholds are expected to be issued in final form in September 2011; a preliminary version of the 2010 thresholds is now available from the Census Bureau.)

The computations for the 2011 poverty guidelines are available.

The poverty guidelines may be formally referenced as "the poverty guidelines updated periodically in the *Federal Register* by the U.S. Department of Health and Human Services under the authority of 42 U.S.C. 9902(2)."

Go to Further Resources on Poverty Measurement, Poverty Lines, and Their History

Go to Frequently Asked Questions (FAQs)

2011 HHS Poverty Guidelines

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Return to the main [Poverty Guidelines, Research, and Measurement](#) page.

Last Revised: 01/21/11

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December 5, 2011

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